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No. 79-1843

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES MASON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: Page

Bishop Engineering Co. v. United States, 180 Ct. Cl. 411 4

Miller v. *Robertson*, 266 U.S. 243 3

Miscellaneous:

Annot., 26 A.L.R. 2d 1139 (1952) 3

1A *Corbin on Contracts* (1963 & Supp. 1980) 3

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The issue in this case is whether eight contracts between petitioner[1] and the government conferred upon petitioner the exclusive right to satisfy the government's construction requirements in the relevant geographical areas.

The contracts required petitioner to perform construction work at a predetermined price within fixed geographical areas (Pet. App. 2). All eight contained a

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[1]Although James Mason is a nominal petitioner, all of the contracts were entered into between the Sommers Construction Company (of which he is the president) and the General Services Administration (Pet. App. 1 n.1). Therefore, "petitioner" refers solely to the company.

"Purpose of Contract" clause[2] that provided, *inter alia*, that "necessary materials, labor and equipment for a complete installation will be furnished and installed by a single contractor at the unit price established," and a "Quantities of Work" clause[3] that cautioned that the amount of work to be performed was indefinite but would generate payments equaling or exceeding $5,000 (*id.* at 2-3).[4] Two of the contracts covered the area around Nashville, Tennessee, and contained an additional clause that stated (*id.* at 3): "Any award under this [contract] will not prohibit or restrict the Government from having any work items performed by Government employees or by others."

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[2]3-1 GENERAL

a. Purpose of Contract: The U.S. Government proposes to enter into a term contract whereby partitions, doors, hardware, painting, electrical work and other necessary materials, labor and equipment for a complete installation will be furnished and installed by a single contractor at the unit price established * * * in quantities and heights as may be required from time to time during the term of the contract * * *. The work ordered under this contract will be performed in any or all Government-owned or Government-leased buildings within [a specified geographical area].

[3]3-3 QUANTITIES OF WORK

a. Bidders are hereby cautioned that quantities shown and listed on the bid form as the bid evaluation estimated quantities are not guaranteed minimums or maximums and in no way have any connection with any required quantities or intend any scope of work. These quantities are for bid evaluation purposes only.

b. The minimum quantity of work which will be required under this contract * * * will not total less than five thousand dollars ($5,000).

[4]The government did order at least $5,000 of work under each contract (Pet. App. 3). Petitioner in fact received substantially in excess of $20,000 per contract and close to $1,000,000 under some of its contracts (*id.* at 10 n.8).

Petitioner contends that the government breached these contracts by contracting with other companies in the relevant geographical areas to perform similar work, reasoning that the "single contractor" phrase in the Purpose of Contract clause gave it the exclusive right to perform the work described therein. While agreeing (Pet. App. 7) that "[o]n its face, and view[ed] * * * in isolation from the remainder of the clauses," the "single contractor" phrase is susceptible to petitioner's interpretation, the Court of Claims observed that such a construction would render superfluous the $5,000 guaranteed minimum purchase provision of the Quantities of Work clause (*id.* at 10-11).[5] On the other hand, the construction urged by the government—that the "single contractor" phrase means that "with respect to any one work project, the contractor awarded the term contract must itself perform all the tasks necessary for a complete installation" and may not subcontract (*id.* at 5)—is consistent with the

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[5]The court observed that were the contracts intended to confer upon petitioner the exclusive right to perform construction work for the government in the relevant geographical areas, no minimum purchase guarantee would have been needed. The scope of the government's planned construction itself would have assured an exclusive contractor a return more than sufficient to induce it to bid and to cover its bidding costs (Pet. App. 10 & n.8). Nor would a minimum guarantee be necessary to make the contracts enforceable since the exclusivity aspect of a requirements contract accomplishes that end. See *Miller* v. *Robertson*, 266 U.S. 243, 250-252 (1924); 1A *Corbin on Contracts* § 158 (1963 & Supp. 1980). If, on the other hand, the contracts were designed to permit the government to purchase unspecified quantities of materials, labor and equipment from petitioner at fixed prices without obligating the government to deal exclusively with petitioner, a minimum purchase guarantee was essential. Absent such a guarantee, an indefinite quantities contract creates an illusory promise and is not enforceable (Pet. App. 5 n.5). See 1A *Corbin on Contracts*, *supra*, at §§ 157-158; Annot., 26 A.L.R. 2d 1139 (1952). Moreover, the $5,000 minimum created a necessary incentive for contractors to submit bids (Pet. App. 10-11).

inclusion in the contracts of the guaranteed minimum dollar amount (*id.* at 11). Therefore, the court concluded, the government's interpretation should be adopted (*ibid.*).

The Court of Claims' decision is correct. It rests on the plain language of the contracts and gives harmonious meaning and effect to every clause in them. See *Bishop Engineering Co.* v. *United States*, 180 Ct. Cl. 411, 415-416 (1967).

At all events, a decision by this Court would have little prospective importance. The government has modified all contracts of the kind involved here to make their non-exclusive nature ineluctably clear (Pet. App. 9 n.7).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[6]Petitioner's contention that this modification constitutes an admission by the government is without merit. As the Court of Claims observed (Pet. App. 9 n.7), revision of contract language that has occasioned disagreement and litigation demonstrates prudence rather than an admission of error. Such revisions are irrelevant to the interpretation of the language changed (*ibid.*).

Petitioner's statement (Pet. 9) that the General Services Administration's legal counsel issued an opinion finding that petitioner had an exclusive right to the work is likewise erroneous. The letter simply summarized the parties' respective arguments without purporting to resolve the issue (Pet. App. 9 n.7).